

FEDERAL ELECTION COMMISSION

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 3987

DATE COMPLAINT FILED: 06/06/94

DATE OF NOTIFICATION: 06/13/94

DATE ACTIVATED: 11/30/94

STAFF ATTORNEY: Mark T. Kim

COMPLAINANT:

Susan Brooks for Congress

RESPONDENTS:

Representative Jane Harman
Friends of Jane Harman and
Jacki Bacharach, as treasurer
Hughes Aircraft Company
C. Michael Armstrong, Chairman & CEO
T.G. Westerman, Senior V.P.
W.D. Merritt, Vice President
Hughes Aircraft Company Active Citizenship Fund
and Daralyn E. Reed¹, as treasurer

**RELEVANT STATUTES
& REGULATIONS:**

2 U.S.C. § 441b
11 C.F.R. § 114

INTERNAL REPORTS CHECKED:

FEC Reports & Indices

FEDERAL AGENCIES CHECKED:

None

I. GENERATION OF MATTER

This matter arises from a complaint filed by the Susan Brooks for Congress committee with the Federal Election Commission ("Commission") on June 6, 1994. The complaint alleges

¹ Daralyn E. Reed is the present treasurer of the Hughes Aircraft Company Active Citizenship Fund. At the times relevant to this matter, James R. Sutton, Esq., was treasurer of the Hughes Aircraft Company Active Citizenship Fund.

that Hughes Aircraft Company made prohibited corporate contributions and impermissibly facilitated the making of contributions to the re-election campaign of Representative Jane Harman. Notice of the complaint was sent to Hughes Aircraft Company ("Hughes") and C. Michael Armstrong, as Chairman and CEO, Hughes Aircraft Company Active Citizenship Fund ("Hughes Fund") and Daralyn E. Reed, as treasurer, T.G. Westerman and W.D. Merritt, as officers of Hughes and directors of Hughes Fund, Friends of Jane Harman ("Committee") and Jacki Bacharach, as treasurer, and Representative Jane Harman.

This Office has received a response from Friends of Jane Harman and Jacki Bacharach, as treasurer. *See* Attachment 1. This Office also has received a joint response from Hughes Aircraft Company, C. Michael Armstrong, Hughes Aircraft Company Active Citizenship Fund and Daralyn E. Reed, as treasurer, T.G. Westerman and W.D. Merritt. *See* Attachment 2.

II. FACTUAL AND LEGAL ANALYSIS

A. Statement of Law

The Federal Election Campaign Act of 1971, as amended ("Act"), prohibits corporations from making contributions or expenditures in connection with any federal election. 2 U.S.C. § 441b(a). The Act further prohibits the officers and directors of a corporation from consenting to any prohibited corporate contribution or expenditure, and it also prohibits any candidate or campaign committee from knowingly accepting or receiving any such contribution or expenditure. *Id.* The Act broadly defines a contribution or expenditure to include any "direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" made to a candidate or campaign committee in connection with any federal election. 2 U.S.C. § 441b(b)(2).

The Act and Commission regulations include certain limited exemptions to or safe harbors from this general prohibition on corporate contributions and expenditures in connection with federal elections. One such exemption permits a corporation to make partisan communications to its stockholders and executive or administrative personnel.²

2 U.S.C. § 441b(b)(2)(A). The corporation must bear the costs of such communications.

11 C.F.R. § 114.3(c)(1)(i). Another such exemption permits the occasional, isolated, or incidental use of corporate facilities for individual volunteer activity in connection with a federal election.³ 2 U.S.C. § 441b. The corporate employee who undertakes such individual volunteer activity must reimburse the corporation to the extent that its overhead or operating costs are increased within a commercially reasonable time for the normal and usual rental charge.

11 C.F.R. § 114.9(a)(2).

B. The Complaint

This matter concerns the activities of Hughes in connection with an October 29, 1993, fundraising event held on corporate facilities for Representative Harman.

² Commission regulations define executive or administrative personnel as "individuals employed by a corporation . . . who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities." 11 C.F.R. § 114.1(c).

³ Commission regulations define occasional, isolated, or incidental use as an amount of activity which does not "prevent the employee from completing the normal amount of work which that employee usually carries out during such work period." 11 C.F.R. § 114.9(a)(1)(i). Notwithstanding this provision, any such activity which does not "exceed one hour per week or four hours per month" shall be considered occasional, isolated, or incidental use. 11 C.F.R. § 114.9(a)(1)(iii).

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2. Hughes & Hughes Fund

Hughes Aircraft Company, C. Michael Armstrong, Hughes Aircraft Company Active Citizenship Fund and Daralyn E. Reed, as treasurer, T.G. Westerman and W.D. Merritt submitted a joint response to the complaint ("Hughes respondents"). See Attachment 2. The Hughes respondents denied that Hughes made prohibited corporate contributions and impermissibly facilitated the making of contributions to the Committee. Further, the Hughes respondents relied upon one of the specific exemptions to the Act's broad prohibition on corporate contributions to argue that the actions of the Committee, Hughes and Hughes Fund in regard to the fundraiser were in compliance with the requirements of the Act.

First, the Hughes respondents would have the Commission use the following novel test for determining whether corporate facilitation exists:

The most sensible test for determining exactly what constitutes facilitation of contributions by corporations or SSFs is to focus

on who foots the bill for getting contributions from contributor to candidate. In other words, if either a contributor or a candidate bears the cost of collecting contributions, then the corporation cannot reasonably be said to have facilitated those payments.

Id. at 7. Using this test, the Hughes respondents then concluded that Hughes did not facilitate the making of contributions because it billed the Committee for the costs incurred by the corporation for providing its facilities and personnel in connection with the fundraiser (e.g., Hughes did not "foot the bill" for the corporate facilitation and therefore is not accountable for it). The Hughes respondents claimed, moreover, that the invoiced costs of the fundraiser were the normal and usual rental charges. The Hughes respondents then argued that the Commission ought to view the use of corporate facilities or personnel as "alternatives [which] merely represent different means of centralizing collection capabilities within a company or SSF. As long as the Committee paid a reasonable fee for the use of such centralizing capabilities within [Hughes], then there can be no prohibited 'facilitation' of contributions." *Id.* at 8 (emphasis added).

Second, the Hughes respondents argued that the invitation and solicitation letters were permissible under Commission regulations governing partisan communications. *Id.* at 5-7. The Hughes respondents noted that this regulation permits a corporation to disseminate partisan materials to its executive personnel, including suggestions to vote for or contribute to a candidate. *Id.* at 6. The Hughes respondents concluded that both the invitation and solicitation letters were permissible partisan communications because all the employees who received the letters fell "within the statutory definition of 'executive or administrative personnel.'" *Id.* at 7.

Finally, the Hughes respondents denied the presence of direction or control over the employees of Hughes who made contributions to the Committee. *Id.* at 9-11.

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IV. **RECOMMENDATIONS**

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5. Take no action at this time with respect to the Hughes Aircraft Company Active Citizenship Fund and Daralyn E. Reed, as treasurer.

6.

7.

Date

4/10/96

Lawrence M. Noble
General Counsel